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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 565

ISBRANDTSEN COMPANY, INC.,

Petitioner,

v.

PAUL MAXIMO, WALTER SALO, ARTHUR R. CRUYS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Isbrandtsen Company, Inc. (hereinafter referred to as "Isbrandtsen"), claimant-cross-libelant-intervenor, prays that a writ of certiorari issue to review two mandamus orders of the United States Court of Appeals for the Second Circuit.

Opinions Below

The District Court rendered no opinion; its orders granting the motions of Isbrandtsen for cross-security and fixing the amount thereof appear at pages 25, 26 of the record of the first above entitled matter and at pages 28, 29 of the record of the second above entitled matter. The one opinion rendered in both proceedings by the Court of Appeals is not yet reported.

Jurisdiction

The decision and order of the Court of Appeals in each case was entered on July 31, 1962. Petitions for rehearing (Record pp. 28-33 in the Maximo case and pp. 39-54 of the Solomon case) were filed on August 14, 1962, and were denied by orders dated September 18, 1962 (Record pp. 40 and 41 in Maximo and pp. 55 and 56 in Solomon).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1) and 2101(c).

Admiralty Rule and Statutes Involved

The provisions of Admiralty Rule 50 and 28 U.S.C. 1292(a), 1651 and 1916, and 46 U.S.C. 596, 701, 705 and 706 are set forth *infra*, pages 1a-4a, appendix.

Questions Presented

1. When a shipowner whose vessel had been arrested under process *in rem*, upon a libel for wages, appears, bonds and answers showing that its seamen—libelants

were participants in a strike called by their union and to support the strike wrongfully and maliciously used the process of the Court to arrest the vessel, is the shipowner's cross-libel under Admiralty Rule 50, alleging such facts and seeking damages for the wrongful and malicious arrest of the vessel good, whether on contract or tort, or is it premature?

2. If the cross-libel is good under Admiralty Rule 50 on any theory, may the District Court, in the exercise of discretion, grant a stay of the original libel until the seamen-libelants post cross-security?

3. Does mandamus lie to compel the District Judge to vacate the stays herein without any showing of facts to refute or negate the averments in the answer and cross-libel that the original libel was not brought in good faith?

Statement

The United States Court of Appeals for the Second Circuit granted petitions of libelants-cross-respondents for writs of mandamus to compel the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York, to vacate stays granted by him of two libels *in rem* against two Isbrandtsen vessels, allegedly for wages, until they posted cross-security, under Admiralty Rule 50, for damages sought by Isbrandtsen in its cross-libels.

In one of the libels, *in rem*, four engineering officers employed on the *SS Flying Fish* sued allegedly for wages in the amount of $1,608 and penalty wages, and arrested the vessels. Isbrandtsen answered and by cross-libel sought damages for having been wrongfully deprived of

the vessel. Isbrandtsen, having filed a stipulation for value to obtain the release of the vessel, moved in its cross-libel suit for an order directing the seamen to furnish cross-security under Admiralty Rule 50. Judge Bruchhausen granted the motion and ordered the seamen's libel stayed until cross-security in the amount of $1,000 was posted.

In the companion case, four other engineering officers employed on the *SS Flying Eagle*, sued by libel *in rem* and arrested the vessel ostensibly for wages in the sum of $17,050, and penalty wages. Isbrandtsen answered and by cross-libel sought damages for having been wrongfully deprived of said vessel and because of their desertions. Isbrandtsen having duly filed a stipulation for value to obtain the release of this vessel, moved in its cross-libel suit for an order directing libelants to post cross-security under Admiralty Rule 50. Judge Bruchhausen granted that motion and ordered the original libel stayed until cross-security, in the amount of $2,500, was posted.

The writs of mandamus, herein, directed Judge Bruchhausen to vacate the two stay orders.

Both vessels arrived and docked at the foot of 29th Street, Brooklyn, N. Y., on March 28, 1962. The *SS Flying Fish* was arrested on March 29, 1962, and the *SS Flying Eagle*, on April 2, 1962.

As the answer and cross-libel in the *Flying Fish* case reveal, libelants-cross-respondents, Paul Maximo, Walter Salo, Arthur H. Cruys, and Robert J. Eagen, had been employed for a coastwise voyage which terminated in Brooklyn, N. Y., on March 28, 1962. The crew, including libelants, were scheduled to be paid off the following morning. But instead of collecting their earned wages at the time of said pay off, and knowing that the wages were not disputed and would be paid on March 29, 1962, they filed their libel and arrested their ship on that same day.

Upon refusal of a tender, the amount of their wages was lodged with the Clerk of the Court.

The answer and cross-libel in the *Flying Eagle* case shows that libelants-cross-respondents, Robert Solomon, Carl A. Hubbell, Martin E. McCary and John Bell, had been employed for a foreign voyage, which was not to terminate in Brooklyn, N. Y., but was to continue to Norfolk, Baltimore, and then to Philadelphia where the voyage was to terminate as the final port of discharge. However, on March 28, 1962, upon arrival of the vessel at Brooklyn, N. Y., these seamen wrongfully, willfully and without cause deserted their vessel, thereby forfeiting their wages; and on April 2, 1962 filed their libel and arrested the vessel.

The answers and cross-libels in both cases reveal that the libelants-cross-respondents all were and are members of the same union, viz., District 2, Marine Engineers Beneficial Association AFL-CIO, an unincorporated labor organization (herein "MEBA").

At the time of the arrival and docking of the two vessels on March 28, 1962, MEBA had authorized, instigated and encouraged its members who were employees on all of Isbrandtsen's vessels, including those here involved, to engage in a strike and picketing of the said vessels and a picket line was put at the dock where the two above named vessels were moored.

In each case the answer and cross-libel alleged that the libelants-cross-respondents, with full knowledge of an alleged dispute between MEBA and Isbrandtsen, and as part of a concerted plan to force Isbrandtsen to accede to MEBA's demands, "wrongfully and maliciously caused the libel herein to be filed * * * and process to be issued thereon to the Marshal * * * to attach and arrest" the respective vessels, and in each case "the vessel was in accordance with such process arrested by the Marshal."

In neither the District Court nor in the Court of Appeals was any effort made by the libelants to rebut or negate the allegations of the cross-libels or to show that their libels were brought in good faith for their own benefit.

The Court of Appeals granted the writs of mandamus solely upon the ground, as stated in its opinion, that the "application of Admiralty Rule 50 in this case was erroneous" and that "the trial court erred in permitting Isbrandtsen to bring cross-libel for abuse of process in these actions. * * * the claim for abuse of process depends upon the outcome of the original proceeding."* The Court, further in obiter, was of the opinion that the orders of the District Court staying prosecution of the original libels until the furnishing of cross-security under Admiralty Rule 50 violates the Congressional policy of "free access" as evidenced by 28 U.S.C. 1916. The clear implication of this decision is that the Court of Appeals considered the issue with respect to libelants' perversion of process (whether thought of as a breach of contract or as a pure tort) is immaterial at this stage.

Reasons for Granting Writs of Certiorari

The unprecedented ruling of the United States Court of Appeals for the Second Circuit that a shipowner whose

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* *Cf.* Prosser, *Law of Torts* (1955) 2nd ed. Page 667: "In the leading English case (Grainger v. Hill, 1838, 4 Bing. N. C. 212, 132 Eng. Rep. 769) the defendant had the plaintiff arrested under civil process in order to compel him through duress to surrender the register of a vessel, without which the plaintiff could not go to sea. Although malicious prosecution would not lie because the proceeding had not been terminated, the court refused to permit its process to be misused for such an end, and held the defendant liable. This decision has been widely followed and the tort is now well established. * * * Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor * * * (citing cases)." See cases cited in the petition for rehearing, in the *Solomon* case, pages 43-48 of the record.

vessel has been arrested upon process *in rem*, wrongfully and maliciously used by cross-respondents, may not file a cross-libel for resulting damages under Admiralty Rule 50 is predicated on what the Court acknowledged in its opinion as a "restricted approach" (Opinion *infra*, p. 7a) in the interpretation of the Rule.

Over one hundred years ago, the English courts held the contrary under a statute which influenced the adoption of our rules. The decision herein conflicts with rulings of the Courts of Appeal for other Circuits which follow the English decisions in interpreting Admiralty Rule 50 and its predecessor Rule 53. The decision also misinterprets 28 U.S.C. 1916.

A. Conflict of decisions respecting cross-libel for damages for attachment in bad faith.

Two English cases cited with approval in federal court decisions are *The Evangelismos* (1858), 12 Moo. P. C. 352, Swa. 378, 14 Reprint 943, 948, and *The Strathaver* (1878) 1 A. C. 58, 66-67. In the former, the Court said, and in the latter, the Court quoted approvingly:

> "Undoubtedly there may be cases in which there is either *mala fides*, or that *crassa negligentia*, which implies malice, which would justify a court of admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded."

The Walter D. Wallet (1893) Prob. Div. 202, quoted and applied that ruling in allowing nominal damages in the absence of proof of substantial damages.

In *Frontera Fruit Co. Inc.* v. *Dowling, et al.*, 91 F. 2d 293 (C. A. 5), the issue was tried and determined as to

whether the libel was filed in bad faith. The Court of Appeals took additional testimony and reversed a decree awarding damages on a cross-libel for wrongful arrest and detention of the vessel, since the testimony taken in that Court established to its satisfaction the good faith of the libelant in suing out the libel.

In *Tampa Ship Repair and Dry Dock Co. Inc.* v. *Esso Export Corp.*, 237 F. 2d 506, 509 (C. A. 5), the Court of Appeals affirmed a holding that the libel was "filed in good faith".

In *Washington-Southern Nav. Co.* v. *Baltimore & P. S. B. Co.*, 263 U. S. 629, 639, this Court stated:

> "Here, as in England, the purpose of the provisions was declared to be to place the parties on an equality as regards security. And, under it, security to satisfy the counterclaim could not be exacted by means of a stay, unless the original libellant had compelled the giving of such security to satisfy his own claim."

This Court quoted at length from the opinion of Judge Addison Brown in *Empresa Maritime & Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502 (263 U. S. 629, 630, f. n. 18).

In the *Empresa* case, *supra*, Judge Brown further said, with reference to predecessor Admiralty Rule 53:

> "It is urged that the fifty-third rule places it in the power of the owner of the vessel arrested to embarrass the libellants through the assertion of large, fictitious, or unfounded claims in the cross-action, and thus require very large security or a stay of the libellants' suit. The rule itself furnishes a sufficient answer to this objection, in the discretion which it allows to the court in requiring security. If the counterclaim be unfounded, fictitious, or grossly exaggerated, it is for the respondents in the suit *in personam* to show this

to the court upon the motion for security. In the present case, no facts are shown to sustain such a charge in reference to this counterclaim, except such as may be derived from the charter-party itself."

Bearing in mind the distinction made by this Court in *Washington-Southern Nav. Co.* v. *Baltimore & P.S.B. Co.*, 263 U. S. 629, *supra*, between proceedings *in rem* and proceedings *in personam*, it is not to be overlooked that Isbrandtsen was and is abundantly able to pay any just wage claims by libelants. What entitled Isbrandtsen to cross claim for damages and move for security was not the mere assertion of unfounded claims by libellants, but rather the willful, wrongful and malicious attachment of the vessels upon such unfounded claims and for collateral purposes of their union. In the language of Judge Brown: "If the counterclaim be unfounded, fictitious, or grossly exaggerated, it is for the respondents in the suit *in personam* to show this to the court upon the motion for security." This they have not done, for the simple reason that libelants cannot deny the truth of the facts shown in the cross-libels.

In *The Mentor*, 4 Mason 84, 17 Fed. Case No. 9427, p. 15, p. 20, Justice Story held that demurrage and expense caused by a vessel putting into and laying up in a port due to mutinous conduct of the crew is damage which may be recovered against the seamen suing in admiralty for their wages, which he held to be forfeited, and that:

> "If the forfeiture exceeds the injury to the owner, there does not seem to be any particular equity calling upon the court to go farther; if it falls short of the injury, then justice requires that the seaman should make such additional compensation as is equivalent to the unsatisfied amount of the injury. . . . My judgment accordingly is, that the demurrage and expenses at St. Helena ought to be allowed to the owners; but

in case the amount does not exceed the forfeited wages, the indemnity is to be sought out of that fund."

The Mentor, supra, which was decided before the Admiralty Rule was changed to include, as does present Admiralty Rule 50, the specification of "any counterclaim *arising out of the same contract or cause of action* for which the original libel was filed," was cited recently in Chief Justice Warren's opinion in *United States* v. *Isthmian S.S. Co.*, 369 U. S. 314, 320.

The acts of libellants as charged in the cross-libels are no less violations of their contracts than were those of the libellants in *The Mentor,* and the counterclaims therefor certainly arise "out of the same contract" under the present wording of Admiralty Rule 50. It is only by virtue of their contracts that libellants asserted the unfounded claims as a pretext for obtaining the arrest of the vessels. Their actions are in breach of their seamen's articles, and the counterclaims alleged in the cross-libels based on that breach, arise "out of the same contract" within the meaning of Admiralty Rule 50.

In the frequently cited case of *The Electron,* 48 Fed. 689, 690 (S.D.N.Y.) the Court followed the liberal rule that in the case of a maritime contract, admiralty *"will proceed to inquire into all its breaches,* and *whatever issues they involve"* (quoting from the opinion by Curtis, J., in *Church* v. *Shelton,* 2 Curt. 271, 274) italics ours; and see cases cited in petition for rehearing in Solomon, pp. 49-52 of the record.

In *British Transport Commission* v. *United States,* 354 U. S. 129, 142, this Court applied the equitable principle of Admiralty Rule 50 in limitation cases, stating that "fairness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for the damage resulting from their acts connected with the identical incident." This Court further stated "that equitable rights between the limitation petitioner

and a claimant have long been recognized as encompassed in Rule 50" (354 U. S. at p. 136). This Court cited *Moore-McCormack Lines* v. *McMahon*, 235 F. 2d 142, where the Court of Appeals for the Second Circuit applied Admiralty Rule 50 in allowing the libellant to implead and cross-claim against the estates of certain of the deceased officers of the vessel for indemnity for amounts that it might be forced to pay if limitation were denied. The court also pointed out that "the issue here presented is of *practical* importance since the appellants appear to be not subject to personal service in the district" (235 F. 2d at 144—emphasis supplied).

The reasoning of these cases is essentially the same as that which influenced Justice Story in *The Mentor, supra*, and should control in the application of Admiralty Rule 50. The "demurrage and expenses at St. Helena" occasioned by mutiny, involved in *The Mentor, supra*, is basically no different from the damages caused by the wrongful and malicious attachment of the vessels in the instant cases, and especially in *The Solomon* case, where the voyage had not yet terminated. Indeed, Isbrandtsen's damages will, in large part, consist of the equivalent of "demurrage and expenses" occasioned by libellants' wrongful conduct as seamen, just as did the shipowner's claim in *The Mentor, supra*.

Leaving the vessel because of a strike before completion of the voyage contracted for, constitutes desertion with resulting forfeiture of wages (46 U.S.C. sec. 701; *The Youngstown*, 110 F. 2d 968, 970 (C. A. 5, cert. denied, 311 U. S. 690; *United States* v. *Smith*, 12 F. 2d 265 (C. A. 5, cert. denied, 271 U. S. 686).* Wrongfully and maliciously attaching the vessel to support a strike compounds and aggravates the breach by desertion. Such is the case of those who libeled and caused the arrest of the *Flying*

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* See petition for rehearing (in Solomon Record, p. 52) citing the *Southern S. S. Co.* case.

Eagle. No less iniquitous is the conduct of those who libeled and caused the arrest of the *Flying Fish*, for they knew that their wages were not disputed and would be paid in accordance with custom and law, and indeed was timely tendered to them (46 U.S.C. sec. 596), and when refused were lodged with the Clerk of the Court. Both groups patently were not acting under 28 U.S.C. sec. 1916 to prosecute a suit "for their own benefit for wages," but were acting as strikers, in violation of their contracts, to insure the success of their union's demand upon Isbrandtsen.

While Section 1916 evidences a Congressional solicitude for the rights of seamen in suits specified in the statute, it does not encompass what purports to be a wage suit but actually is one for the promotion of a strike. Section 1916 carefully confines its applicability to suits brought by seamen "for their own benefit," and even then, dispenses only with "prepaying fees or costs or furnishing security therefor." Damages for wrongful and malicious attachment of vessels are not "fees or costs." The suit against the *Flying Fish* is shown actually to have been to prevent the payment, and in furtherance of the refusal by libellants to receive payment of their wages in the customary manner on the morning following arrival of the vessel in port (46 U.S.C. sec. 596). The suit against the *Flying Eagle* is shown to have been preceded by a desertion for the calculated purpose of forfeiting earned wages and then attaching the vessel upon false claims therefor. There is nothing in Section 1916 which overrides the policy of Sections 596 and 701, or which permits strikers who wrongfully and maliciously arrest a vessel for ulterior and collateral motives and objectives, to avoid the applicability of Admiralty Rule 50 when the damaged shipowner cross-claims for his damages. If Rule 50 was intended to exclude seamen from its cross-security requirements it would have been so written.

B. Issuance of the extraordinary writ of mandamus.

This Court has repeatedly held that mandamus against judges is a drastic remedy, reserved for extraordinary cases of misuse or failure to use judicial authority (*Ex parte Fahey*, 332 U. S. 258, 259-260; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21; *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 251).

Appeals have been entertained from interlocutory orders in proceedings under Admiralty Rule 50 (*Pan American Shipping Corp.* v. *Maritime Columbiana Limitada*, 193 F. 2d 845 (C. A. 5); *Spriggs* v. *Hoffstat*, 240 F. 2d, 76, 80 (C. A. 4)). But assuming, *arguendo*, that the orders are not appealable and that in a proper case the granting of a stay under Admiralty Rule 50 might justify mandamus, the Court of Appeals here acted without any showing of an abuse of discretion, or that this is a proper case for mandamus. Indeed, Judge Bruchhausen exercised a high degree of restraint in requiring security from four engineering officers of only $1,000 in the one case, and $2,500 in the other. His orders were made in the proper exercise of discretion and should not have been disturbed by mandamus.

C. Importance of Question.

In *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 251, this Court said:

> "The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals, led to our grant of a writ of certiorari."

Here, too, the questions are of importance, not only in the administration of the Admiralty Rules, but to the entire shipping industry. The holding of the Court of Appeals with respect to the propriety of the cross-libels herein will tend to encourage the misuse of process *in rem* in aid of

wholly-collateral labor quarrels. Such a ruling is fraught with danger to shipowners.* It gives seamen and their unions a powerful strike weapon and furnishes them with an additional means of exerting economic pressure against shipowners by misuse of legal process.

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* See petition for rehearing (Solomon record, p. 52) and the editorial in The New York Times of October 18, 1962.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Wages of Seamen

46 U.S.C.A. Sec. 596—Time for Payment

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

Rule 50—Admiralty Rules, Supreme Court—Security on Cross-Libel

Wherever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall

give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs."

28 U.S.C.A. Sec. 1292(a)—Interlocutory Decisions

(a) The Courts of Appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

28 U.S.C.A. Sec. 1651—Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appro-

priate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, S. 90, 63 Stat. 102.

Merchant Seamen

46 U.S.C.A. Sec. 705—Enforcement of Forfeitures

Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding the offense in respect of which such question arises, though made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceeding.

46 U.S.C.A. Sec. 701—Various Offenses; Penalties

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits of any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amount-

ing to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay. • • •

Seamen's Suits

28 U.S.C.A. Sec. 1916—SEAMEN'S SUITS

In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security thereof.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1961.

(Argued June 4, 1962 Decided July 31, 1962.)

Docket Nos. 27585, 27586

ROBERT SOLOMON, CARL A. HUBBELL, MARTIN E. MCCARY, and JOHN BELL,

Petitioners,

—v.—

Honorable WALTER BRUCHHAUSEN, United States District Court, Eastern District of New York,

Respondent.

PAUL MAXIMO, WALTER SALO, ARTHUR R. CRUYS, and ROBERT J. EAGEN,

Petitioners,

—v.—

Honorable WALTER BRUCHHAUSEN, United States District Court, Eastern District of New York,

Respondent.

Before:

LUMBARD, *Chief Judge*, and
CLARK and WATERMAN, *Circuit Judges.*

Petitions for mandamus to compel the Honorable Walter Bruchhausen, United States District Judge for the Eastern

District of New York, to vacate the stays granted by him of the petitioners' libels *in rem* against Isbrandtsen Company, Inc., for earned wages until they post security under Admiralty Rule 50 for the damages sought by the Company on cross-libels. Petitions granted.

LEE PRESSMAN, New York City (David Scribner and Ned R. Phillips, New York City, of counsel), *for petitioners.*

KRISEL, BECK & TAYLOR, New York City, *for Isbrandtsen Company, Inc., intervenor.*

CLARK, *Circuit Judge*:

Petitioners, seamen on vessels of Isbrandtsen Company, Inc., brought libels *in rem* against their employer, alleging nonpayment of earned wages. Following provision of security by Isbrandtsen, the libeled vessels were released. Isbrandtsen then filed cross-libels in both actions alleging abuse of process by the petitioners in arresting the vessels. Judge Bruchhausen, acting pursuant to Admiralty Rule 50, ordered the actions stayed until petitioners posted security for damages on the cross-libels. Asserting that the orders are erroneous and prejudicial, and that they are not appealable, petitioners here petition for a writ of mandamus to compel the trial judge to vacate the stays and permit the suits to proceed. Because we conclude that the application of Admiralty Rule 50 in this case was erroneous, and results in substantial prejudice to petitioners which cannot be cured on appeal, we grant the petitions.

The first question for determination is whether the orders are appealable; if they are, mandamus is not a proper remedy herein. The stays cannot be considered orders granting an injunction and thus appealable under 28 U. S. C. § 1292(a)(1). *Schoenamsgruber* v. *Hamburg American*

Line, 294 U. S. 454. Nor may the stays be appealed under 28 U. S. C. § 1292(a)(3), as they do not determine the rights and liabilities of the parties. See *Allen N. Spooner & Son, Inc.* v. *Connecticut Fire Ins. Co.*, 2 Cir., 297 F. 2d 609. Since interlocutory appeals cannot be taken from the orders, we may turn to a consideration of the merits of petitioners' claim.

The trial court erred in permitting Isbrandtsen to bring cross-libels for abuse of process in these actions. Admiralty practice places strict limitations upon the bringing of cross-libels. It is well settled that, under Admiralty Rule 50, only if a claim arises out of the same contract or cause of action for which the original libel was filed may it be consolidated by cross-libel with the original claim. *United States* v. *Isthmian S.S. Co.*, 359 U. S. 314. The Chief Justice there, after citing and analyzing the many cases, went on to state that if this procedure is "anachronistic" the remedy was through exercise of the rule-making power now granted the Court, and not through change by decision. It is difficult to find a claim for abuse of process in bringing an original libel as arising out of the original "cause of action" under the restricted approach here stated, for the claim for abuse of process depends upon the outcome of the original proceeding. Even under the Civil Rules, which permit counterclaims arising out of wholly unrelated transactions, F. R. 13(b), a claim for abuse of process in initiating an action is held premature and not available even as a permissive counterclaim to that action. *Bach* v. *Quigan*, D. C. E. D. N. Y., 5 F. R. D. 34; 1A Barron & Holtzoff, Federal Practice & Procedure 562, 563 (Wright Ed. 1960); 3 Moore's Federal Practice ¶13.13, p. 36 (2d Ed. 1948); Wright, *Estoppel by Rule: The Compulsory Counterclaim under Modern Pleading*, 38 Minn. L. Rev. 423, 444, 445 (1954); Note, 58 Yale L. J. 490 (1949). Hence, it would seem clear *a fortiori* that such a claim may not be brought in admiralty by cross-libel. Cf. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779. It was therefore error for the trial court to permit Isbrandtsen to raise its claim of abuse of process by cross-libel.

This error led the court to contravene a fundamental facet of the broad Congressional policy favoring and facilitating seamen's wage claim suits. Congress has looked with great favor upon such actions; has regulated them in great detail; and has granted seamen preferential treatment over other litigants in admiralty. See *Isbrandtsen Co.* v. *Johnon, supra,* 343 U. S. 779; *Warner* v. *Goltra,* 293 U. S. 155; Robinson on Admiralty 285-286 (1939). Seamen's wages are protected even from legitimate claims of their employers or others. *Wilder* v. *Inter-Island Steam Nav. Co.,* 211 U. S. 239. One of the advantages Congress has given seamen prosecuting wage claims is access to the federal courts free of all requirements to post security as a condition of suit. Normally a libelant need not post security of any kind to answer in damages, but he may be required to give security for costs. Admiralty Rule 24; *Washington-Southern Nav. Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U. S. 629, 633. In order to free seamen of all financial preconditions to suit, Congress passed a statute relieving them of any requirement even to provide security for fees and costs. *Washington-Southern Nav. Co.* v. *Baltimore & Philadelphia Steamboat Co., supra,* 263 U. S. 629, 633. This statute, 28 U. S. § 1916, now provides: "In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor." The order of the district court here, conditioning access to the court in a wage claim suit upon the posting of security, violates the Congressional policy of free access, evidenced by the quoted statute.

Isbrandtsen argues, however, that Admiralty Rule 50, which permits a stay of an original libel brought *in rem* until security is posted on a cross-libel, must control in this case. The policy of this rule is to require a libelant who has compelled the respondent to post security for dam-

ages to provide in his turn a like security on any cross-libel. The rule does constitute an exception to the general principle that no party in admiralty can be required as a condition of bringing suit to give security to satisfy the claim of another. *Washington-Southern Nav. Co.* v. *Baltimore & Philadephia Steamboat Co., supra,* 263 U. S. 629, 633. Whether in a seaman's suit for wages its policy in a proper case would override the seaman's right of free access is a difficult question which we need not decide here. As we have indicated, it was error to permit a cross-libel in this case; and since the rule is limited to cases where a cross-libel is proper, it has no application to the resolution of this case.

The final question is whether mandamus is the correct remedy to cure the trial court's erroneous issuance of a stay in this action. The policy of free access for wage claims is clearly an important one. And unless the order is vacated forthwith, petitioners will be seriously prejudiced, in a manner that subsequent appeals cannot cure. If they cannot post the security required, they will be unable to vindicate their claim for wages due; and even if they can provide security, they will have been subject to the very sort of inconvenience and delay from which Congress attempted to free them. We have held that mandamus will lie to vacate an order erroneously staying a seaman's personal injury claim until costs of a prior proceeding were paid. *Gregory* v. *Dimock,* 2 Cir., 286 F. 2d 717. While this order was not in direct contradiction to 28 U.S.C. § 1916, which refers to *prepayment* of costs and thus to the costs of the proceeding initiated by the libel, we held there that the stay was in contravention of the general policy of free access evidenced by that statute, and thus mandamus would lie to vacate it. A like conclusion must follow in the present case.

The petitions are granted; the stays must be vacated and the actions permitted to proceed.